THE DISQUALIFICATION OF JUDGE HILLYER IN THE COLORADO STRIKE CASES. — At common law the only ground for the disqualification of a judge was a pecuniary or personal interest in the subject matter of the cause.[1] But there are statutes in almost all the states providing that a judge is disqualified if he has been of counsel or if he is biased or prejudiced.[2] The party objecting must put in a verified affidavit that the judge is prejudiced or interested. Ordinarily the facts on which the conclusion is based must be positively stated,[3] but in some states a mere statement of the conclusion is enough.[4] The latter rule, however, seems unwise, for it offers an easy method of delaying the proceedings without the check imposed by the danger of a prosecution for perjury if false facts are stated in the affidavit. It is usually held that the disqualification statutes are mandatory, and that when a proper affidavit is filed the judge is *ipso facto* disqualified, and has no jurisdiction. That is, the judge may pass upon the sufficiency of the affidavit, but not upon the truth of the facts stated therein;[5] it is the imputation of prejudice, not the actual existence of the alleged grounds of imputation, which causes the disqualification. Any other rule would violate the well-settled principle that a man cannot be judge in his own cause, and practically defeat the purpose of the statutes, since it is only in extreme cases that a man can realize his prejudice.[6] Moreover, a decision on the truth or falsity of the allegations would be a decision of a question of fact, and not reviewable, except for abuse of discretion. Nevertheless, a few states have adopted a contrary rule,[7] and others, though follow-

---

the due process clause of the Constitution. McGovern *v.* City of New York, 229 U. S. 363.

[1] People *v.* Williams, 24 Cal. 31 (prejudice). See People *v.* Compton, 123 Cal. 403, 56 Pac. 44, 48.

[2] For typical statutes, see U. S. COMP. STAT. 1913, § 988; MILLS ANN. STAT. (COLO.), § 7692; MONT. REV. CODES, § 6315.

Generally, only one judge may be disqualified in each case; but the Montana statute permits five disqualifications. See State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

[3] *Ex parte* Am. Steel Barrel Co., 230 U. S. 35; Powers *v.* Reynolds, 89 Ky. 259, 12 S. W. 298. See Erbaugh *v.* People, 57 Colo. 48, 52, 140 Pac. 188, 190; People *v.* Findley, 132 Cal. 301, 304, 64 Pac. 472, 473.

[4] Lincoln *v.* Territory, 8 Okl. 546, 58 Pac. 730; State *v.* Palmer, 4 S. D. 543, 57 N. W. 490.

[5] Powers *v.* Commonwealth, 114 Ky. 237, 70 S. W. 644; Murdica *v.* State, 137 Pac. 574 (Wyo.); State *v.* Palmer, 4 S. D. 677, 62 N. W. 631; Erbaugh *v.* People, 57 Colo. 48, 140 Pac. 188; Cox *v.* United States, 100 Fed. 283.

The normal way to attack the judge's ruling in such a case is by writ of error; but an application for a writ of prohibition is also a proper method, even though the judge, and not the court, loses jurisdiction. This is true whether the judgment is voidable, on account of a common-law disqualification, or void, as when the disqualification is statutory. Forest Coal Co. *v.* Doolittle, 43 W. Va. 210, 46 S. E. 238; North Bloomfield Gravel Mining Co. *v.* Keyser, 58 Cal. 315. See Dimes *v.* Grand Junction Canal, 3 H. L. 759, 785; Moses *v.* Julian, 45 N. H. 52, 54.

Of course, when the application is for a change of venue on account of popular feeling, counter affidavits may be filed, and the judge must pass on the facts. See State *v.* Palmer, 4 S. D. 543, 545, 57 N. W. 490, 491.

[6] The late Judge Brewer is quoted in Lincoln *v.* Territory, 8 Okl. 546, 58 Pac. 730, as saying, "All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it."

[7] State *v.* DeMaio, 70 N. J. L. 220, 58 Atl. 173; Moses *v.* Julian, 45 N. H. 52. This rule is usually based on the wording of the local statutes. Thus, Cox *v.* United

ing the majority rule if the affidavits are uncontradicted, permit the filing of counter affidavits, and allow the recused judge to pass upon the evidence.[8] Perhaps the matter could be most easily and satisfactorily handled by the submission of the affidavits directly to a superior court on an application for prohibition. This method would avoid the absurdity of forcing the trial judge to decide whether certain acts which he knows are false would, if true, be sufficient to constitute prejudice in law.

The most difficult question, however, in these cases is to determine what constitutes the interest or prejudice that the statute provides for. It is clearly settled that any pecuniary interest, however small, in the result of the case is a ground for recusation.[9] Many cases hold, however, that a judge will not be disqualified on the ground of bias unless he is prejudiced against the defendant personally,[10] or has been of counsel in the same cause between the same parties.[11] A recent Colorado case shows a salutary tendency to disregard these technical rules, and consider the question from a practical, common sense standpoint. *People* v. *Hillyer*, 152 Pac. 149.[12] During the recent coal strike, several of the miners were indicted for murder and other crimes alleged to have been committed in the course of the conflict resulting from the strike, and were to be tried before Judge Hillyer. They put in affidavits alleging that Hillyer had acted as counsel for the mine owner in similar cases against other strikers; that the defense intended to apply for a change of venue on the ground of popular prejudice, and that the judge had a pre-formed opinion contrary to their contention on that question; and that Judge Hillyer was a strong partisan of the mine owners, having condemned the strikers and their cause in vigorous language. Judge Hillyer refused to disqualify himself, and a writ of prohibition was granted by a majority of the Supreme Court.

When one remembers how high the feeling in Colorado ran at the time of the strike, and the lengths to which the bitter hostility of both sides was carried, it seems almost too obvious for argument that a declared

---

States, 5 Okl. 701, 50 Pac. 175 (overruled by Lincoln *v.* Territory, 8 Okl. 546, 58 Pac. 730), was decided like the New Jersey case, under a statute which read, "if it shall be shown to the court."

[8] Talbot *v.* Pirkey, 139 Cal. 326, 73 Pac. 858; Crouch *v.* Dakota, W. & M. R. R. Co., 18 S. D. 540, 101 N. W. 722. See Morehouse *v.* Morehouse, 136 Cal. 332, 69 Pac. 625.

[9] MacMillan *v.* Spencer, 28 Colo. 80, 62 Pac. 849; Magruder *v.* Swann, 25 Md. 173; *Ex parte* Cornwell, 144 Ala. 497, 39 So. 354.

But it is sometimes held that the judge is not disqualified if his pecuniary interest is small, and no one else can take jurisdiction in his place. Matter of Ryers, 72 N. Y. 1.

[10] Ingles *v.* McMillan, 5 Okl. Cr. 130, 113 Pac. 998; Bent *v.* Lewis, 15 Mo. App. 40; People *v.* Findley, 132 Cal. 301, 64 Pac. 472. See Johnson *v.* State, 31 Tex. Cr. 456, 20 S. W. 985.

[11] Stockwell *v.* Glaspey, 160 S. W. 1151 (Tex. Civ. App.); Bryan *v.* Austin, 10 La. Ann. 612; Blackburn *v.* Craufurd, 22 Md. 447; The Richmond, 9 Fed. 863; Trinkle *v.* State, 127 S. W. 1060 (Tex. Cr. App.).

But see State *v.* Perkins, 124 La. Ann. 947, 50 So. 805; Barnes *v.* State, 27 Tex. Cr. 461, 83 S. W. 1124; Woody *v.* State, 69 S. W. 155 (Tex. Cr. App.). In these cases the judge was disqualified because he had been counsel for one of the parties in proceedings growing out of the same subject matter, as when the judge in a criminal case was counsel when the same matter came up in civil proceedings.

[12] See RECENT CASES, this issue, p. 459.

partisan of the mine owners, formerly actively engaged in the strife on their side, could not, no matter how good his intentions, give a fair and unprejudiced hearing in a case which directly or indirectly involved the whole issue between the contestants. Nevertheless, two judges of the Supreme Court dissented, and Governor Carlson and Speaker Stewart of Colorado issued statements unfavorably criticizing the decision of the court.[13] The feeling of the authors of these statements and of the dissenting judges was that such a departure from the technical rules gave too great opportunity for the postponement of trials on account of trivial accusations of prejudice, which would hinder rather than promote justice. For this reason they contended that the prejudice must be against the defendant personally,[14] not against the party or cause he represents, and that the fact that the judge believes the defendant guilty is not enough,[15] since he passes on the law and not on the facts. Of course, certain limits on the power to disqualify for prejudice are essential. Prejudice which would disqualify a juryman would not necessarily be a sufficient ground for the recusation of a judge, since, as the dissent points out, the judge does not pass directly on the facts.[16] But the line of distinction between personal and party prejudice seems an illogical one, for it is obvious that hostility against the cause which a man represents and for which he is standing in the particular trial is a greater menace to impartiality than mere personal feeling. There seem few real decisions on the point, for in most cases the affiant manages to find facts showing a personal prejudice. In Kentucky, however, there is a line of decisions holding that party prejudice is sufficient to disqualify a judge. Thus it has been held that a judge who was a strong partisan of local option and bitterly hostile to the liquor interests was incompetent to try a prosecution for violation of the liquor statutes.[17] The same rule has been applied to cases arising out of a political campaign.[18] The language of these decisions applies exactly to the Colorado case, and when it is remembered that in addition Judge Hillyer had been of counsel in previous cases involving the same issue, though between different parties, and had a pre-formed opinion on the issue of change of venue for prejudice which he would be compelled to pass on,[19] the justice of the court's result is beyond question.

---

[13] See the DENVER NEWS for Aug. 19, 20, 1915. For this information and much valuable comment the writer is indebted to an unpublished article by Mr. Hugh McLean of the Denver Bar.

[14] See n. 9, *supra*.

[15] Heflin *v.* State, 88 Ga. 151, 14 S. E. 112; State *v.* Morrison, 67 Kan. 144, 72 Pac. 554; Ingles *v.* McMillan, 5 Okl. Cr. 130, 113 Pac. 998, *accord*. See *contra*, Chenault *v.* Spencer, 68 S. W. 128 (Ky.).

[16] See Northampton *v.* Smith, 52 Mass. 390. In that case the court said that the same test would not apply, even where the judge decided both the law and the facts. But the weight of authority seems *contra* on the latter point. Williams *v.* Robinson, 60 Mass. 333; State *v.* Board of Education, 19 Wash. 8, 52 Pac. 317.

[17] Wathen, etc. Co. *v.* Commonwealth, 116 S. W. 336 (Ky.); Rush *v.* Denhardt, 138 Ky. 238, 127 S. W. 785.

[18] Kentucky Publishing Co. *v.* Gaines, 110 S. W. 268 (Ky.); Powers *v.* Commonwealth, 114 Ky. 237, 70 S. W. 644; Givens *v.* Crawshaw, 55 S. W. 905 (Ky.).

[19] It is immaterial that the issue in question may never actually come before the court for decision. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.